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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS DANIEL RIOS, et al.

Defendants and Appellants.

H034481

(Santa Cruz County

Super. Ct. Nos. F00786, F00788,  
F00790)

Appellants Luis Rios, Salvador Garcia, and Jesus Salazar were convicted of various crimes in connection with the deaths of Vladimir Hernandez, Javier Escalante, and Luis Reyes Escobar.<sup>1</sup> Following a contested victim restitution hearing, on June 5, 2009, the court awarded \$270,062.97 in direct victim restitution (Pen. Code, 1202.4, subd. (f)), with joint and several liability as to all three appellants. For reasons that follow, we remand for a new restitution hearing.

Each appellant filed a timely notice of appeal. On appeal, the appellants challenge the restitution order on various different grounds, which we shall outline *post*. First, however, we outline the procedural background of this case.

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<sup>1</sup> We have taken judicial notice of the records in appellants' first appeal in H026159 and appellant Rios's appeal in H034085. The facts underlying appellants' crimes are not relevant to this appeal.

### *Procedural Background*

In May 2003, Rios, Garcia and Salazar were found guilty of three counts of involuntary manslaughter in the shooting deaths of Hernandez, Escalante and Escobar. In addition, as to Rios, the jury found true the allegation that Rios personally discharged a firearm from a motor vehicle with the intent to inflict great bodily injury or death within the meaning of Penal Code section 12022.55, which was attached to each count, and one count of willfully and maliciously discharging a firearm from a motor vehicle in violation of Penal Code section 12034; as to Garcia, the jury found him guilty of two counts of knowingly permitting a person to bring a firearm into his motor vehicle in violation of Penal Code section 12034, subdivision (a); as to Salazar, the jury found him guilty of one count of placing a concealable weapon in a vehicle in violation of Penal Code section 12025.

The trial court sentenced appellants to state prison and ordered direct victim restitution in the amount of \$89,458.10, with joint and several liability.

Appellants appealed their convictions. This court reversed the judgment for instructional error, but did not address the appellants' challenge to the restitution order, which had been raised in the appeal.

Rios was retried and again the jury found him guilty of three counts of involuntary manslaughter. Both Garcia and Salazar entered guilty pleas to a violation of Penal Code section 32, accessory after the fact. The court sentenced Rios to 18 years, four months in state prison. The court sentenced Garcia and Salazar to three years in state prison. Due to credits from their initial incarceration, the prison terms were deemed served.

As noted, following a contested victim restitution hearing the court awarded \$270,062.97 in direct victim restitution (Pen. Code, 1202.4, subd. (f)), with joint and several liability as to all three appellants. The probation officer's report recommended

that restitution be set at \$86,219.10 "with 10% interest to the victims per 1202.4 (f)(3)(8)." <sup>2</sup>

### *The Restitution Hearing*

We set forth in detail the individual restitution amounts awarded, the basis for each claim that was presented and the objections made by trial counsel. It is important to note that no witnesses testified at the restitution hearing. Further, the court did not explain how the individual amounts of restitution were calculated.

### *Funeral Expenses to Michael Hernandez*

The court awarded Michael Hernandez \$14,875.10 for funeral expenses for the three decedents to be paid to the Victim's Compensation and Claims Board. This claim was based on documentation submitted by the Revenue Recovery and Compliance Division. Appellants' counsel did not object to this amount below.

### *Restitution to Manuel Cabrera for Lost Wages*

The court ordered \$2,380 (\$1,344 plus interest at 10 percent) to Manuel Cabrera based on a declaration signed by Cabrera under penalty of perjury that he was a relative of Vladimir Hernandez, was a prosecution witness, and had lost wages in the amount of \$1,344. A memorandum from a member of the District Attorney's Office stated that Cabrera's employer paid him cash and would verify employment only by telephone, not in writing. The preparer of the memorandum, which was not submitted under penalty of perjury states that "To the best of [her] knowledge [employment] was verified by phone by Marissa in June 2000. The company is no longer in business." Appellants' counsel objected to this award on the grounds that there was no documentation to substantiate the amount of lost wages and nothing to show that Cabrera qualified as a victim. Counsel pointed out that Cabrera did not testify during the second trial because he was

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<sup>2</sup> This citation makes no sense. Former Penal Code section 1202.4, subdivision (f)(3)(G) provided for interest at the rate of 10 percent per annum to accrue "as of the date of sentencing or loss, as determined by the court." (Stats.1999, ch. 584 § 4.)

"unavailable," and the prosecution did not know where he was so it was impossible to establish his familial relationship to Hernandez.<sup>3</sup> Furthermore, Rios's counsel indicated that her research revealed that the company for which Cabrera claimed he worked was still in business, but the company was not able to supply any records for Cabrera.<sup>4</sup>

*Restitution to Laura Estefany Hernandez Leiva*

The court ordered restitution in the amount of \$147,834.70 to be paid to Laura Estefany Hernandez Leiva (hereafter Laura). This represented the amount the prosecution claimed Vladimir Hernandez would have sent, in escalating monthly payments to his daughter in El Salvador if he had lived, up until the daughter reached the age of 18. It included interest compounded annually from 2000.

The court based the award on a letter from Hernandez's employer, a document purporting to show that Hernandez was the father of Laura, and a declaration from a member of Hernandez's family stating that Hernandez sent money to El Salvador to support his daughter.

The prosecution provided the court with a document in Spanish that the prosecutor represented to the court was an official record showing that Hernandez was the father of Laura;<sup>5</sup> and a declaration under penalty of perjury from Laura's grandmother in El

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<sup>3</sup> We note that Cabrera's testimony from the first trial was read into the record in the second trial. Cabrera claimed he was Hernandez's cousin.

<sup>4</sup> The clerk's transcript contains a declaration under penalty of perjury from Gregory Lupore, a licensed private investigator retained by Rios's defense counsel. Lupore stated that he had contacted Cabrera's employer, Geno's Landscaping Services, in order to subpoena business records from the company. Lupore indicated that the owner of the company thought that Cabrera's claim was "more than he would have thought." Lupore noted that he had tried to subpoena the business records of the company, but the company refused to comply with the subpoena.

<sup>5</sup> The prosecutor told the court that the Spanish document "on its face says it is a copy of the original. It is dated 2003. . . . [¶] There's -- the Court is not required to but may judicially notice a certified court record which is precisely what that birth certificate is. [¶] If you look it's signed by a registrar and what it says, I don't know how much point there is for me to say what it says in Spanish but -- . . . [¶] Starts at the third line

Salvador stating that Hernandez had sent \$200 per month to her for his daughter's care;<sup>6</sup> and a letter from a Julian Hernandez (Hernandez's uncle) confirming that Hernandez sent \$200 per month to Laura.

Bill Gibson of Kestrel Construction wrote a letter to the trial court regarding Hernandez's work with his firm. According to Gibson, Hernandez worked for Gibson for a little over a year. His starting wage was \$8 per hour, but twice Gibson had given him a raise, once to \$10 per hour and once to \$12 per hour. Gibson stated that he would have given Hernandez another raise if he had lived. Regarding Hernandez's future income, Gibson stated that he could only "guess" what might have happened, but opined that within five or six years Hernandez would be making \$45 per hour.

Based on all of this documentation, the prosecution argued that in the year of his death Hernandez would have been making \$37,440 per year; that by May 2001, he would have been making \$49,420 per year; that by May 2002, he would have been making \$74,880 per year; that by May 2004 or 2005, he would have been making \$112,320 year.<sup>7</sup> The prosecution argued that because Hernandez was sending \$200 per month or eight percent of his wages to Laura each month, Laura would be entitled to eight percent of his wages over time.

Defense counsel objected to the document that the prosecutor represented to the court was a birth certificate for Laura on the ground that it was not dated, did not appear to be an official document and there was no foundation for its admissibility; and objected to the evidence of Hernandez's wages because there was no documentation in the form of

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from the bottom and it says this conforms with the original, which is what we get here in the United States, certified copies of originals. It's the same thing."

<sup>6</sup> In addition to this declaration, another declaration from Laura's uncle stated that Laura's grandmother could not read or write but after reading the declaration to her, Laura's grandmother had agreed with the declaration and signed it by providing her fingerprints.

<sup>7</sup> It appears that the prosecution's calculations were based on the assumption of an eight hour work day and a six day work week.

a W-2 or 1099 form to verify the wages nor was there any evidence to substantiate the claim that Hernandez sent \$200 each month for Laura's support. Counsel argued that there was no authority for the type of escalating restitution that the prosecution was claiming. Counsel pointed out that Mr. Gibson had declined to honor a defense subpoena.

#### *Restitution to Escobar's Parents*

The court ordered restitution in the amount of \$34,990.73 to be paid to Salvador Escobar. Again, this amount included interest.

The court based the award on a declaration signed under penalty of perjury from Marisol Reyes, the younger sister of Luis Reyes Escobar that her brother had sent \$200 per month to their parents in El Salvador.

Based on the assumption that Escobar would have continued to pay his mother \$200 a month for 10 years "and beyond" the prosecution suggested that the amount of lost support would be \$24,000, and that with interest compounded annually the total amount of loss would be \$34,990.73.

Defense counsel objected to this award on the ground that there was no evidence to substantiate the claim that the money was sent and no evidence to show that Luis Reyes Escobar was actually employed.

#### *Restitution to Escalante's Parents*

The court ordered restitution in the amount of \$69,981.47 to be paid to the parents of Javier Escalante. Again, this included interest compounded annually.

The court based the award on a declaration signed under penalty of perjury from Escalante's brother Jorge Escalante stating that his brother sent \$400 per month to their parents in El Salvador.

Again, defense counsel objected to this award on the ground that there was no evidence to substantiate the claim that the money was sent and no evidence to show that Escalante was actually employed.

In ordering restitution, the court overruled all the defense objections. The court did not explain how it arrived at its calculation of each amount. It appears, however, that the court relied on the prosecution's calculation of the amount to be awarded. The court did state that it was awarding interest "from the date of the loss."

### *Discussion*

We begin with an overview of the law pertaining to direct victim restitution as it existed at the time of appellants' crimes.

"In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights. . . . Proposition 8 established the right of crime victims to receive restitution directly 'from the persons convicted of the crimes for losses they suffer.' (Cal.Const., art. I, § 28, subd. (b).)" (*People v. Giordano* (2007) 42 Cal.4th 644, 652 (*Giordano*).) Article I, section 28, subdivision (b), of the California Constitution provided: "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary."

In implementing Proposition 8, the Legislature enacted Penal Code section 1202.4, which at the time of appellants' crimes provided:<sup>8</sup> "(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the

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<sup>8</sup> Since victim restitution in the ex post facto context has been characterized as punishment, we find it prudent to apply the restitution statutes in effect at the time of appellants' crimes. (*People v. Zito* (1992) 8 Cal.App.4th 736, 740-741.)

commission of a crime shall receive restitution directly from any defendant convicted of that crime. . . . [¶] (3) The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . the following: . . . [¶] (B) Restitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment. . . . [¶] (f) In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. [¶] (1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion. (2) Determination of the amount of restitution ordered pursuant to this subdivision shall not be affected by the indemnification or subrogation rights of any third party. Restitution ordered pursuant to this subdivision shall be ordered to be deposited to the Restitution Fund to the extent that the victim, as defined in subdivision (k), has received assistance from the Victims of Crime Program pursuant to Article 1 (commencing with Section 13959) of Chapter 5 of Part 4 of Division 3 of Title 2 of the Government Code. [¶] (3) To the extent possible, the restitution order shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including, but



not limited to, all of the following: [¶] (A) Full or partial payment for the value of stolen or damaged property. The value of stolen or damaged property shall be the replacement cost of like property, or the actual cost of repairing the property when repair is possible. [¶] (B) Medical expenses. [¶] (C) Mental health counseling expenses. [¶] (D) Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor. [¶] (E) Wages or profits lost by the victim . . . due to time spent as a witness or in assisting the police or prosecution. [¶] (F) Noneconomic losses, including, but not limited to, psychological harm, for felony violations of Section 288. [¶] (G) Interest, at the rate of 10 percent per annum, that accrues as of the date of sentencing or loss, as determined by the court. [¶] (H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim. [¶] (I) Expenses incurred by an adult victim in relocating away from the defendant, including, but not limited to, deposits for utilities and telephone service, deposits for rental housing, temporary lodging and food expenses, clothing, and personal items. Expenses incurred pursuant to this section shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim. [¶] (J) Expenses to install or increase residential security incurred related to a crime, as defined in subdivision (c) of Section 667.5, including, but not limited to, a home security device or system, or replacing or increasing the number of locks. [¶] (K) Expenses to retrofit a residence or vehicle, or both, to make the residence accessible to or the vehicle operational by the victim, if the victim is permanently disabled, whether the disability is partial or total, as a direct result of the crime." (Stats.1999, ch. 584, § 4 pp. 4142-4145.)

Thus, Penal Code section 1202.4 provides for full restitution of victims' *economic* losses, but "does not authorize direct restitution for noneconomic losses. [Citation.]" (*Giordano, supra*, 42 Cal.4th at p. 656.) Furthermore, "direct victims of crime have a

statutory right to restitution on the full amount of their losses without regard to the full or partial recoupment from other sources (except the state Restitution Fund). [Citations.]" (*People v. Baker* (2005) 126 Cal.App.4th 463, 468.)

"Since its amendment in 1996, the list of categories of compensable loss in Penal Code section 1202.4 has been nonexclusive: the order 'shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for *every determined economic loss* incurred as the result of the defendant's criminal conduct, *including, but not limited to,*' the 11 enumerated categories . . . . [Citation.]" (*Giordano, supra*, 42 Cal.App.4th at p. 656.)

At the time of appellants' crimes a victim was defined to include the immediate surviving family of the actual victim and derivative victims as defined in then Government Code section 13960. (Former Pen. Code, § 1202.4, subds. (k)(1) & (3), added by Stats 1999, ch. 584, § 4, pp. 4142-4245.)

Former Government Code section 13960, subdivision (a)(2), provided that a derivative victim was "a resident of California, or resident of another state, who is one of the following: [¶] (A) At the time of the crime was the parent, sibling, spouse, or child of the victim. [¶] (B) At the time of the crime was living in the household of the victim. [¶] (C) A person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to a relationship listed in subparagraph (A). [¶] (D) Is another family member of the victim, including the victim's fiancé or fiancée, and witnessed the crime. [¶] (E) Is the primary caretaker of a minor victim, but was not the primary caretaker at the time of the crime." (Stats. 1998, ch. 895, § 1.3, pp.5844-5845, operative Jan. 1, 1999.)

In general, at a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 690-691 (*Prosser*); *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1048 (*Keichler*).)

"Once the victim has made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim. [Citations.]" (*Prosser, supra*, 157 Cal.App.4th at p. 691.)

#### *Standard of Review*

We review the trial court's restitution order for abuse of discretion. (*Giordano, supra*, 42 Cal.4th at p. 663.) "The abuse of discretion standard is 'deferential,' but it 'is not empty.' [Citation.] '[I]t asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citations].' [Citation.] Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Id.* at pp. 663-664.)

#### *Appellants' Contentions*

Initially, we deal with appellants' constitutional challenges to the victim restitution order.<sup>9</sup>

#### *Double Jeopardy*

Essentially, appellants contend that the court's restitution award violated the state constitutional prohibition against double jeopardy because the court increased victim

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<sup>9</sup> We note that by letter dated February 2, 2010, Salazar withdraws his argument that the trial court abused its discretion and denied him due process when it awarded restitution for losses that did not arise from the activity that formed the basis of his conviction for being an accessory after the fact.

restitution after a successful appeal and retrial.<sup>10</sup> Appellants' claim is based on the assertion that victim restitution constitutes punishment.

In *People v. Harvest* (2000) 84 Cal.App.4th 641 (*Harvest*), the First District Court of Appeal considered the propriety of a victim restitution order, which was initially imposed at a resentencing. (*Id.* at p. 645.) The victim restitution order was challenged on due process and double jeopardy grounds. Restitution in the form of funeral and burial expenses, which had been incurred by the mother of a victim, was overturned due to the lack of a sufficient evidentiary support. However, the court affirmed the restitution order in all other respects, including child support payments that one of the deceased victims was required to make. In so ruling, the majority held that the double jeopardy prohibitions of the California Constitution (Cal. Const., art. I, § 15) did not bar the trial court from imposing victim restitution for the first time at resentencing, because court-ordered victim restitution is a civil remedy rather than a punishment. In short, the majority reasoned that, although the rationale of victim restitution includes some element of deterrence, such restitution is more analogous to a civil remedy than to a criminal fine

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<sup>10</sup> Garcia concedes that counsel did not object on double jeopardy grounds to the increase in victim restitution. "[T]echnically" the issue is not cognizable on appeal. (*People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1; see *People v. Belcher* (1974) 11 Cal.3d 91, 96.) However, because Garcia and Rios contend their attorneys were ineffective, we must consider whether the contention has merit. (*Marshall, supra*, at p. 824, fn. 1; *Belcher, supra*, at p. 96.) "A matter normally not reviewable upon direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153.) The California Supreme Court has stated that, when "applying a forfeiture rule . . . would likely have the effect of converting an appellate issue into a habeas corpus claim of ineffective assistance of counsel for failure to preserve the question by timely objection . . . we would be loath to invoke a rule that would proliferate rather than reduce the nature and scope of legal proceedings. [Citation.] After all, judicial economy is a principal rationale of the forfeiture doctrine. [Citation.]" (*People v. Butler* (2003) 31 Cal.4th 1119, 1128.) Accordingly, we address this issue.

or penalty, since its purpose is to provide monetary compensation for actual economic losses incurred by the victim. (*Id.* at pp. 647-653.)

The *Harvest* court explained that restitution fines are specifically termed "punishments" in the Penal Code, must be imposed even where the crime is victimless, are payable to the state treasury, cannot exceed \$10,000, may be calculated with reference to the years of imprisonment and the number of crimes and victims, may vary with the gravity of the offense, and cannot generally be avoided by an inability to pay. (*Harvest, supra*, 84 Cal.App.4th at pp. 646-647.) On the other hand, the court reasoned that victim restitution is not statutorily termed a punishment, is payable only when there is a victim, and is set without limit in an amount equal to the victim's loss as compensation for the defendant's crime. (*Id.* at pp. 647-648.) The court concluded these differences demonstrated a legislative intent that victim restitution constitutes a civil remedy, not a criminal punishment. (*Id.* at p. 649.) The majority found that since victim restitution had not historically been regarded as punishment, was primarily directed to making the victim whole rather than punishing the defendant, and was limited in amount to the victim's actual economic loss there was no clear proof that victim restitution was effectively a criminal penalty despite the Legislature's intent to the contrary. (*Id.* at p. 650.)

Thus, *Harvest* stands for the proposition that double jeopardy does not apply to victim restitution orders.

Appellants Salazar and Garcia argue that *Harvest* is wrongly decided, and urges this court to follow Justice Poché's dissent, in which he concluded that direct victim restitution is so punitive in purpose and effect as to render it a criminal punishment, thereby offending "the double jeopardy provisions of our state Constitution under the rule announced in *People v. Henderson* (1963) 60 Cal.2d 482, 495-497 . . . ." (*Harvest, supra*, 84 Cal.App.4th at p. 656, [dis. opn of Poché, J.]) His dissent points out that such an order is only imposed upon conviction of a crime, and that it could far exceed the

scope and scale of damages which otherwise would be available to the victim in a civil suit. (*Ibid.*)

Nevertheless, we are persuaded by the majority opinion in *Harvest* and conclude that double jeopardy considerations do not bar the imposition of the direct victim restitution order for the damages suffered by the victims in this case. Victim restitution is imposed as recompense for the monetary harm caused by those convicted of a crime.

Since the direct victim compensation provisions of section 1202.4 are not criminal penalties barred by the double jeopardy provisions of the state and federal Constitutions, we reject appellants' constitutional arguments that the court could not increase the amount of victim restitution after appellants' successful appeal.

*Due Process—Right to a Jury Trial*

In essence, Rios and Garcia argue that due process requires a jury determination of the restitution amount.

Rios and Garcia rely on the statement in *Giordano* that the numerous decisions holding that restitution hearings require fewer due process protections "were decided prior to the high court's decision in *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 [*Cunningham* ], and our decisions in *People v. Black* (2007) 41 Cal.4th 799 . . . and *People v. Sandoval* (2007) 41 Cal.4th 825 . . . , which required 'that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' [Citations.] Because defendant has not raised any due process or other state or federal constitutional challenge, however, we do not have occasion to address possible constitutional challenges to restitution hearings." (*Giordano, supra*, 42 Cal.4th at p. 662, fn. 6.)

The Supreme Court's decision in *Cunningham* was based upon its earlier decision in *Blakely v. Washington* (2004) 542 U.S. 296, where the high court ruled that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond

the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " (*Id.* at pp. 301, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Since the California statute governing victim restitution—Penal Code section 1202.4—does not prescribe a statutory maximum, we believe that it is not necessary to have the amount of victim restitution submitted to a jury.

We note that the California Supreme Court has yet to address the question of whether a restitution hearing must be tried to a jury. However, the Fourth District Court of Appeal has answered this question unfavorably for appellants. In *People v. Millard* (2009) 175 Cal.App.4th 7 (*Millard*), the court rejected the defendant's claim that he had a Sixth Amendment right to a jury trial at a section 1202.4 victim restitution hearing, disagreeing with his "premise that Penal Code section 1202.4 victim restitution constitutes increased punishment for a crime." The court agreed instead with the court in *Harvest, supra*, 84 Cal.App.4th 641 that " 'the primary purpose of victim restitution is to provide monetary compensation to an individual injured by crime,' " a collection procedure that is civil in nature. (*Millard, supra*, 175 Cal.App.4th at p. 35.) The *Millard* court explained that "[t]o the extent a victim restitution order has the secondary purposes of rehabilitation of a defendant and/or deterrence of the defendant and others from committing future crimes, those purposes do not constitute increased punishment of the defendant . . . ." (*Id.* at pp. 35-36.)

The *Millard* court explained that "Penal Code section 1202.4's requirement that a trial court issue an order providing for full restitution of a victim's economic losses does not constitute a *sentencing choice* by the trial court. Rather, because that statute requires the court to award the victim full restitution, the court's determination of that amount in a restitution hearing by a preponderance of the evidence does not involve a defendant's Sixth Amendment right to a jury or proof beyond a reasonable doubt." (*Millard, supra*, 175 Cal.App.4th at p. 36, italics added.)

Federal appellate courts have reached the same conclusion that the Sixth Amendment does not require jury trials on issues of victim restitution. (See, e.g., *United States v. Leahy* (3d Cir. 2006) 438 F.3d 328, 338 [collecting cases]; *United States v. Sosebee* (6th Cir. 2005) 419 F.3d 451, 461-462; *United States v. Behrman* (7th Cir. 2000) 235 F.3d 1049, 1054 [holding that *Apprendi* does not affect the calculation of restitution]; *United States v. Wooten* (10th Cir. 2004) 377 F.3d 1134, 1143-1144.) We agree with their conclusion that the trial court has the prerogative to determine victim restitution and reject all of appellants' arguments to the contrary.

Alternatively, Rios argues that he has a constitutional right to a jury trial because if restitution is a civil matter the California Constitution guarantees the right to a jury trial in civil cases.

Certainly, the "governing statutes specify that an order for victim restitution may originate from criminal court, but expressly recognize that such an order 'shall be enforceable as a civil judgment.' [Citations.]" (*Harvest, supra*, 84 Cal.App.4th at p. 647.) However, a restitution order when imposed is part of a criminal sentencing procedure and is not a civil matter. It becomes a civil matter only when it comes to the victim enforcing the restitution order. Accordingly, we reject Rios's argument that he had a right to a civil jury trial.

#### *Excessive Fine*

Rios contends that the procedure for determining restitution violated his constitutional right to be free from excessive fines.

The excessive fines clause of the Eighth Amendment to the United States Constitution is not implicated by the restitution award. (Compare *People v. Hanson* (2000) 23 Cal.4th 355 with *Harvest, supra*, 84 Cal.App.4th 641.) Since restitution is confined to the victim's actual economic loss, it cannot be condemned as excessive. (*Harvest, supra*, at p. 650.)



### *Due Process—Method of Determining Restitution*

Rios contends that the method of determining restitution set forth in California case law violated his right to due process of law. Rios points out that recent California cases have held that a defendant's right to due process in restitution hearings is minimal. He argues that California's procedure of requiring the prosecution to present only a prima facie case and then shifting the burden to the defendant to prove to a judge a lower amount is inappropriate. He asserts that here he "complained that the prosecution had provided little or no proof to substantiate most of the restitution amounts it asked the court . . . to award. Trial counsel observed that it had attempted to subpoena such persons as Mr. Hernandez'[s] employer, Mr. Gibson and Mr. Shilling, Mr. Escalante's purported employer but those persons had ignored the subpoenas. For such reasons, it was essentially impossible for the defense to rebut the prosecution's contentions."<sup>11</sup>

The fundamental aspects of due process are the right to notice and the opportunity to be heard. (See *People v. Bautista* (1998) 63 Cal.App.4th 865, 870.) In proceedings to determine the amount of restitution to be ordered, " '[a] defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . and the defendant has an opportunity to challenge the figures in the probation report . . . .' " (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113.) Of course in this case, the probation report stated that the amount of restitution being claimed was \$86,219.10, which included \$70,000 to support Laura, \$1344 for Manuel Cabrera, \$14,875.10 to Michael Hernandez, plus interest. No mention was made of any restitution

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<sup>11</sup> Appellants' counsel did not object on due process grounds below. However, to the extent appellants' due process claims may be considered a claim that the trial court exceeded its authority under section 1202.4, subdivision (f), we find that appellants' failure to object did not result in forfeiture of the issue because the claim falls within the " 'unauthorized sentence' " exception to the general rule that failure to raise an issue in the trial court results in forfeiture of the issue on appeal. (See *People v. Slattery* (2008) 167 Cal.App.4th 1091, 1095.) We will therefore consider the merits of defendant's due process claim.

being claimed by the parents of Escobar or Escalante. However, on March 13, 2009, approximately 12 weeks before the restitution hearing, the prosecution filed a "Points and Authorities Regarding Restitution," which set forth in detail the amount of restitution being claimed by all the victims. Attached to the points and authorities were all the documents that we detailed *ante* as support to substantiate the claims. Thus, appellants had notice and all availed themselves of the opportunity to contest the claims made. That is all due process requires.

*Substantial Evidence of Loss of Future Economic Support*

Essentially, appellants assert that the trial court abused its discretion by basing the future economic loss calculations (support for Laura, the parents of Escalante and the parents of Escobar) on the uncorroborated statements of interested parties.

Appellants point out that over objection, "the trial court considered various uncorroborated statements of the alleged victims to establish an order for restitution for lost wages. The order, based on inapposite authority offered by the prosecution, effectively suggests that the mere statement of a fact is sufficient under the law to support a finding requiring restitution. Though the statements of alleged victims regarding the value of personal property may be used to establish a *prima facie* case for restitution for the loss of such property . . . there appears to be no case that allows the proof of the losses (rather than the value of losses) based merely on the statements of the interested parties. In this case, the unsupported statements of the victims were insufficient to overcome the objections of counsel and prove the restitution owed." Garcia notes that this appears to be an issue of first impression in California.

At the outset, we note that the standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt. (*People v. Baker* (2005) 126 Cal.App.4th 463, 468-469.) "In reviewing the sufficiency of the evidence, the 'power of the appellate court begins and ends with a determination as to whether there is

any substantial evidence, contradicted or uncontradicted," to support the trial court's findings.' [Citations.]" (*Ibid.*)

In *Giordano*, the California Supreme Court held section 1202.4 did not preclude a court from ordering a defendant convicted of vehicular manslaughter to pay restitution to the surviving spouse for "future economic losses attributable to the deceased victim's death." (*Giordano, supra*, 42 Cal.4th at p. 649.)

Nevertheless, the *Giordano* court pointed out that although "a trial court has broad discretion to choose a method for calculating the amount of restitution" (*Giordano, supra*, 42 Cal.4th at p. 663), the trial court must, "employ a method that is rationally designed to determine the [crime] victim's economic loss." (*Id.* at pp. 663-664.)

Thus, "[w]hile the court need not order restitution in the precise amount of loss, it 'must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.' " (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1172; see also *People v. Ortiz* (1997) 53 Cal.App.4th 791, 800 [while the amount of restitution cannot be arbitrary or capricious, there is no requirement the restitution order be limited to the exact amount of the loss in which the defendant is actually found culpable, nor is there any requirement the order reflect the amount of damages that might be recoverable in a civil action].)

Finally, we note that "[i]f there is no substantial evidence to support the award, and assuming no other rational explanation, the trial court will have obviously abused its discretion." (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 993 (*Thygesen*).)

Factors relevant to the trial court's reasonable determination of loss of future economic support "will necessarily depend on the particular circumstances before the court. Generally, the calculation of the loss of support may be informed by such factors as the earning history of the [decedent], the age of the survivor and decedent, and the degree to which the decedent's income provided support to the survivor's household. These guideposts are not provided as an exhaustive list. Naturally the court's discretion

will be guided by the particular factors at play in each individual claim." (*Giordano, supra*, 42 Cal.4th at p. 665.)

Although a defendant has the burden of establishing that the amount of the loss is other than that claimed by the victim, where loss of future economic support is concerned, "[t]he burden is on the party seeking restitution to provide an adequate factual basis for the claim." (*Giordano, supra*, 42 Cal.4th at p. 664.)

Initially, we note that Salazar and Rios contend that the parents of Escobar and Escalante were not entitled to restitution.

The determination of who may receive and how much they may receive in future economic losses, is inherently different from the determination of how much a stolen or damaged piece of property was worth in order that restitution may be made to owner. Accordingly, similar to the *Giordano* court (*Giordano, supra*, at pp. 658-659), we look to wrongful death actions and statutes to guide our analysis here.

A cause of action for the death of a person caused by the wrongful act of another may be asserted by the decedent's parents "if they were dependent on the decedent." (Code Civ. Proc., § 377.60, subd. (b).)

As the *Giordano* court explained, "[t]he purpose of the statute establishing standing for certain persons to bring wrongful death actions, Code of Civil Procedure section 377.60, 'is to enable the heirs and certain specified dependents of a person wrongfully killed to recover compensation for the *economic loss* and deprivation of consortium they suffer as a result of the death.' [Citation.] One of the approved jury instructions for calculating wrongful death losses describes the 'financial support, if any, which each of said heirs would have received from the deceased except for the death, and the right to receive support, if any, which each of the heirs has lost by reason of the death' as 'economic damage.' [Citations.]" (*Giordano, supra*, 42 Cal.4th at pp. 658-659.)

In *Giordano* the Supreme Court noted, "[t]he Legislature very clearly intended 'that a victim of a crime who incurs *any economic loss* as a result of the commission of a

crime shall receive restitution directly from any defendant convicted of that crime.' [Citation.] The Legislature is presumed to be aware of ' "judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]" ' [Citation.]" (*Giordano, supra*, 42 Cal.4th at p. 659.) Accordingly, the Supreme Court concluded that "when it enacted Penal Code 1202.4, requiring that victims receive restitution for all economic losses, it did so with the presumed knowledge that courts have long understood that a surviving spouse incurs an economic loss upon the death of his or her spouse." (*Ibid.*)

Similarly, we must conclude that the Legislature was aware that courts have long understood that dependent parents incur an economic loss upon the death of a son or daughter. "Given the constitutional and legislative intent to provide restitution for all crime victim losses, and the expressly nonexclusive list of categories of loss included in the direct restitution statute" (*id.* at p. 660), we decline to hold that Escobar's parents and Escalante's parents are not entitled to restitution for loss of future economic support, even though they are not residents of this country and their sons were under only a moral obligation to send money.<sup>12</sup> (See *Taylor v. Albion Lumber Company* (1917) 176 Cal. 347, 352 [nonresident aliens may maintain actions under the wrongful death statutes]; *Sneed v. Marysville Gas, etc. Co.* (1906) 149 Cal. 704, 710 [pecuniary loss may be either a loss arising from the deprivation of something to which the heirs are legally entitled or it could be reasonably expected such heirs would receive from the deceased had he or she lived even though the obligation may have been only a moral obligation].)

That being said, as noted, the burden was on Escobar's parents and Escalante's parents to "provide an adequate factual basis for the claim." (*Giordano, supra*, 42 Cal.4th at p. 664.)

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<sup>12</sup> Appellants do not challenge that Laura is entitled to claim economic loss even though she is a nonresident alien. Even if they had, the same analysis would apply to her.

In *Giordano*, the adequate factual basis of the wife's claim for loss of her decedent husband's future economic support was provided by the testimony of the decedent's employer establishing the decedent's earnings for the three years preceding his death and by the decedent's spouse that decedent " 'was a provider' " for their family. Based on this testimony, the court ordered the defendant to pay restitution to the wife in the amount of \$167,711.65, which was calculated by multiplying the husband's average annual earnings over the three years prior to his death by five years. (*Giordano, supra*, 42 Cal.4th at p. 663.) Although the Supreme Court found the trial court's calculation imprecise, it was not persuaded that the trial court abused its discretion. (*Ibid.*)

Respondent argues the victims' statements regarding losses they incurred from criminal acts are prima facie evidence of the losses, citing *Keichler, supra*, 129 Cal.App.4th 1039. *Keichler* states as an example that victims' statements about the value of the property stolen constitute " 'prima facie evidence of value for purposes of restitution.' " (*Id.* at p. 1048.) The situation here differs from *Keichler* because although the court in *Keichler* viewed the victims' statements as prima facie evidence, there was expert testimony provided, and the victims' written statements had attached receipts that constituted substantial evidence of the amount of victim restitution ordered by the court. (*Id.* at p. 1043.) As this court has explained before, the *Keichler* court "found that the amount of restitution was adequately established by evidence including unobjected-to statements in the probation report from the victims, an itemization of amounts sought, 'a recitation of their medical *bills* ' and certain expenses incurred by them, receipts for certain items claimed, and expert testimony establishing the reasonableness of certain amounts. [Citation.]" (*In re K.F.* (2009) 173 Cal.App.4th 655, 665.)

Here, the statement of Escobar's sister that her parents received \$200 per month in support from her brother and the statement from Escalante's brother that his parents received \$400 per month in support from his brother without anything comparable to a "receipt" showing the loss is not substantial evidence to justify the claims for loss of

future economic support. Although a victim is not required to provide an exact dollar amount of his or her losses to a certainty (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121), here the issue is not that the victims provided an uncertain or inexact amount, but that the victims did not present sufficient evidence to establish their loss. Without something more tangible than an unsupported bare assertion of loss of economic support, a victim has not provided "an adequate factual basis for the claim." (*Giordano, supra*, 42 Cal.4th at p. 664; *Harvest, supra*, 84 Cal.App.4th at p. 650 [restitution is limited to actual and *demonstrated* economic loss].)<sup>13</sup>

As the *Harvest* court noted, a victim's claim outlined in the probation officer's report or in this case the pleadings of the prosecution, may satisfy notice requirements for purposes of due process, but it cannot take the place of evidence. (*Harvest, supra*, 84 Cal.App.4th at p. 653; accord *Thygesen, supra*, 69 Cal.App.4th at pp. 995-996.)

As noted, in our view the determination of who may receive and how much they may receive for loss of future economic support, is inherently different from the determination of how much a stolen or damaged piece of property was worth in order that restitution may be made to owner. A piece of property or even such things as medical bills are more tangible than claims for loss of future economic support. In cases involving property loss or damage or even injury to the victim the prosecution has already proved beyond a reasonable doubt the actual loss, damage or injury occurred. There is a more direct link between the loss and the underlying crime. This is not so where the loss of future economic support is concerned. Accordingly, where a victim claims loss of future economic support, we conclude that more is required than the bare assertion that a decedent was supporting the person or persons claiming the loss.

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<sup>13</sup> Furthermore, without anything to substantiate a victim's claim for loss of future economic support there is always the risk that victims will become opportunistic in order to punish the defendant.

We do not mean to imply that appellants should not be held responsible for all the consequences of their acts. However, to allow victims to claim restitution for loss of economic support without anything to verify the claim reduces the process to mere paper accounting.

Although we have not decided this issue on due process grounds, we note that a "trial court violates a defendant's due process right at a hearing to determine the amount of restitution if the hearing procedures are fundamentally unfair. [Citation.]" (*People v. Cain* (2000) 82 Cal.App.4th 81, 87.) Reliability of the information considered by the court is the key issue in determining fundamental fairness. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754-755.) Without anything to substantiate the victims' claims in this case, there was no way for defense counsel to challenge the amount of restitution claimed by Escobar's parents, Escalante's parents and Laura. Due process requires the opportunity to be heard at a meaningful time *and in a meaningful manner*. (*People v. Litmon* (2008) 162 Cal.App.4th 383, 396.)<sup>14</sup>

We are mindful that while the "power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court" (*In re Carpenter* (1995) 9 Cal.4th 634, 646) and we recognize that sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes (*People v. Baumann* (1985) 176 Cal.App.3d 67, 81), here no witnesses testified at the hearing. It is axiomatic that a person's declaration puts his or her credibility at issue, but without that person testifying or producing something to substantiate the claim a

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<sup>14</sup> As Rios's counsel argued to the court, "[s]hort of putting an investigator on a plane to El Salvador, there's really not much we can do which is why we asked for anything, any scrap of paper that would demonstrate 200 a month was sent consistently from the time Mr. Hernandez was employed by Mr. Gibson until the time of his death." Moreover, it appears that several of the people that the defense subpoenaed refused to comply with the subpoenas. At least as to Mr. Gibson, the court refused to enforce the subpoena.



court has nothing upon which to make a credibility determination regarding the matters stated.<sup>15</sup> As such, the court's determination one way or the other is arbitrary.

Since the trial court's determination of the amount of loss to the parents of Escobar and Escalante was not based on factual evidence presented at the hearing the awards cannot stand.

Furthermore, nowhere in the record of the restitution hearing do we find where the trial court made a clear statement of the calculation method used and how that method justified the amount ordered. It appears that the court accepted the prosecution's calculations without question. As the *Giordano* court noted, and we reiterate that the court must, at a minimum, calculate the loss of support on the earning history of the decedent, the age of the survivor and decedent, and the degree to which the decedent's income provided support to the survivor's household. (*Giordano, supra*, 42 Cal.4th at p. 666.) None of this information is in the record presented to the trial court. Accordingly, there was no evidence presented to the trial court from which a rational determination of loss could be made. Thus, we must remand the matter for a new hearing on the economic loss to Escobar's and Escalante's parents.

As to the award of economic support to Laura, again, we find the "evidence" of Laura's economic loss lacking. No court has discretion to find facts for which there is not substantial evidence. Thus, again, we must remand the matter for a new hearing.<sup>16</sup>

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<sup>15</sup> It appears that the trial court had some concern over the declarations it had before it when the court "wonder[ed] whether . . . this is not something that is a lie here."

<sup>16</sup> As noted, payments for the care of Laura were based on a declaration from Laura's grandmother that she received \$200 per month for Laura's care. However, nothing was presented to establish that the money was sent or actually received. Given the fact that according to Hernandez's uncle the grandmother lived in "a remote location without fax, mail and limited phone service," it is not apparent to this court how Hernandez could have sent any money without leaving some sort of paper trail.

### *Restitution to Manuel Cabrera*

As noted the court ordered \$2,380 (\$1344 plus interest at 10 percent) to Manuel Cabrera based on a declaration signed by Cabrera under penalty of perjury that he was a relative of Vladimir Hernandez, was a prosecution witness, and had lost wages in the amount of \$1344. Cabrera's declaration did not detail the hours of work that he lost assisting the prosecution or the amount he was paid by Geno's Landscape Services. The prosecution claimed that Cabrera qualified as a derivative victim under Government Code sections 13951 and 13955, subdivision (c)(4).

Government Code section 13951, which currently contains the definition of who is a derivative victim, was not enacted until after appellants' crimes. (Stats. 2002, ch. 1141, § 2, pp. 5667-5668.) We do not question, however, that Cabrera qualified as a victim under former Penal Code section 1202.4, subdivision (k)(3). (Stats. 1999, ch. 584, § 4, p. 4147.) He was a derivative victim under former Government Code section 13960, subdivision (a)(2), which provided that a derivative victim was "a resident of California, or resident of another state, who is one of the following: . . . [¶] (D) Is another family member of the victim, including the victim's fiancé or fiancée, and witnessed the crime." (Stats. 1998, ch. 895, § 1.3, p. 5845.) Thus, because Cabrera was Hernandez's cousin and witnessed the crime, he qualifies as a victim.

Crime victims may receive restitution for wages lost while they are assisting the police or prosecution. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1074-1075.)

As noted, Penal Code section 1202.4 authorizes victim restitution for the purpose of reimbursing victims for the actual economic loss suffered as a result of a defendant's offense. The problem with the restitution order in this case is not a misinterpretation of the meaning or purpose of section 1202.4, but rather with the absence of sufficient evidence to support the finding of economic loss in the form of lost wages or other employment benefits for time spent assisting the prosecutor and attending hearings. The

economic loss may be established by evidence of the time spent for these purposes, the value of that time and the reduction in pay or compensation the victim suffered as a result of that time. Did the victim miss work or use holiday or vacation time, and if so, how much? Did the employer reduce the victim's compensation otherwise payable or shorten holiday or vacation time otherwise available to the victim? These answers are essential to establish an economic loss for lost wages or other employment benefits. However, the evidence at the restitution hearing did not answer these questions. The prosecution did not even present evidence of the *time* Cabrera spent on the case and did not present evidence of actual *economic loss* other than Cabrera's declaration that he lost wages of \$1,344.

To establish an economic loss for lost wages, there must be evidence that the victim lost compensation from employment or used holiday or vacation time as a result of time spent assisting the prosecution and attending hearings. That evidence could be by testimony or declaration of the victim, detailing how many days or hours he spent in court and/or assisting the prosecution and how much he would normally work during a week, or testimony or a sworn declaration from victim's employer detailing how many days or hours of work were lost and how much the victim would normally be paid.

Furthermore, restitution for lost wages does not include payment for time spent when one would not otherwise be earning wages or receiving employment benefits. If a victim spends time on days when he or she would not be working, restitution cannot be awarded for lost wages based on the victim's hourly earnings at work if wages would not have been earned during that time.

Again, the situation here differs from *Keichler, supra*, 129 Cal.App.4th 1039 because there was no equivalent of a "receipt" or testimony by Cabrera's employer showing an economic loss. Thus, there was not substantial evidence to justify the claim for lost wages or employment benefits. Accordingly, the amount cannot stand.

For the guidance of the trial court on rehearing we address two remaining contentions.

*The Method of Calculating Restitution for Economic Loss*

Garcia contends that the manner in which the court calculated restitution was not a rational means of determining the losses sustained by the victims. Garcia argues that the trial court must evaluate the evidence submitted by the prosecution and on the basis of that evidence calculate a reasonable award for loss of future economic support. Garcia asserts that when the trial court bases its restitution award on speculation or an arbitrary formula, the resulting restitution order constitutes an abuse of discretion.

Garcia points to the award to Laura as "the most dramatic example of the trial court's abuse of discretion. One starts with Mr. Gibson's prediction that within five or six years, Vladimir Hernandez would be making over \$100,000.00. Hernandez'[s] earning history – a condition precedent to a calculation of his future earnings within the meaning of *Giordano* – was approximately a year of working in construction starting at \$8.00 per hour. From that rapid rise in his first year of employment, Gibson extrapolates an increase in his income until he would be making \$112,320.00 no later than 2006."

It appears that the trial court followed the prosecutor's recommendation and indexed the amount of support for the care of Laura to Mr. Gibson's prediction of a rise in Hernandez's income. The prosecutor claimed that because Hernandez's income in May 2000 had been at the rate of \$12 per hour he was making \$576 per week or \$2,496 per month. The prosecutor maintained that from the monthly income, Hernandez sent home \$200, which according to the prosecutor constituted eight percent of Hernandez's monthly pay.

The prosecutor argued that over time Hernandez would have continued to send eight percent of his income per month to his daughter. Accordingly, based on Mr. Gibson's projections the prosecutor submitted the following table as the calculation of the lost income/support for Laura.

<u>TIME FRAME</u>	<u>MONTHLY</u>	<u>ANNUALLY</u>
5/2000 – 5/2001 (\$15)	\$249.60	\$2995.20
5/2001 – 5/2002 (\$20)	\$332.80	\$3,993.60
5/2002 – 5/2005 (\$30)	\$499.20	\$5,990.40
5/2005 – 5/2016	\$748.80	\$8,985.60
TOTAL FOR 5/2000 –5/2016 (11 years):		\$98, 841.60 <sup>17</sup>

We make the following observations. First, although the prosecutor's conclusion that Hernandez would have continued to send eight percent of his income to Laura is based on speculation, this speculation was necessitated by Hernandez's death at the hands of appellants and it would ill behoove appellants to complain. (See *People v. Abraham* (1986) 185 Cal.App.3d 1221, 1229; *Harvest, supra*, 84 Cal.App.4th at p. 653.)<sup>18</sup>

Second, as to Mr. Gibson's projections of Hernandez's future earnings, the trial court should keep in mind that even though it has broad discretion in making a restitution award, that discretion is not unlimited. While it is not required to make an order in keeping with the exact amount of loss, the court must use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498-499.) The trial court cannot base an award on an employer's "guess" as to what someone would be earning without something to substantiate that "guess."

#### *Interest on the Awards*

Appellants contend that the trial court abused its discretion by awarding 10 percent interest to each award calculated from the date of the loss.

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<sup>17</sup> The prosecutor did not concede that Laura was entitled to support only to the age of 18.

<sup>18</sup> Of course, if in a new hearing the evidence shows that Hernandez did not increase the amount of support to Laura when he received his pay raises, then appellants would certainly have a good argument that the prosecutor's assumption was not rationally based on the evidence.

The prosecution's points and authorities indicate that the amount of restitution claimed by the victims included interest compounded annually at 10 percent from the date of the death of the decedents to the time of the restitution hearing.<sup>19</sup>

Penal Code section 1202.4 provides for interest on economic loss pursuant to subdivision (f)(3)(G), which, as noted, provides for interest at a rate of 10 percent per annum "that accrues as of the date of sentencing or loss, as determined by the court." (Pen. Code, § 1202.4, subd. (f)(3)(G).)

Garcia argues that there appears to be little direction to the trial courts on the calculation of such interest. Salazar contends that a defendant's duty to pay restitution does not arise until the court determines there is a legal duty to compensate a victim's economic losses and here the award of interest from the date of each alleged loss was punitive in nature and an abuse of discretion resulting in an award that vastly overstated the actual loss.

"Restitution is commonly understood as 'an act of restoring or a condition of being restored . . . (a) a restoration of something to its rightful owner[,] (b) a making good of or giving an equivalent for some injury.' [Citation.] It obligates the defendant wrongdoer to restore to the victim the value of those things he or she was deprived of by the wrongful act." (*People v. Boudames* (2006) 146 Cal.App.4th 45, 52.) Restitution does not include penalties. (*Ibid.*) The Legislature intended to make the victim whole for every economic

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<sup>19</sup> As to the restitution amount for Laura, the prosecution described how interest was added to the amount as follows: "(1) the interest is figured from each year of pay rather than each month of pay as the calculations would be too difficult; (2) for the first year of pay, the interest is figured from the date of May, 2001, representing one year of pay at ten percent for nine years, which is the time of sentencing as establishing the interest beyond the date of sentencing would be very difficult because there is no way to anticipate when the defendant will pay restitution, if ever; (3) for each of the following years, the interest is figured for one year less, in other words, for the pay from May, 2001 through May, 2002, the interest for that year is figured at eight years, with the following accruing interest for seven years, etc."

loss. (*Thygesen, supra*, 69 Cal.App.4th at p. 994.) However, the purpose is not to give the victim a windfall. (*Id.* at p. 995.)

Respondent contends that the trial court acted within the express language of the statute by setting interest from the date of the death of the decedents. The court provided 10 percent annual interest as indicated in the statute. Respondent does not explain, however, where the trial court was authorized to compound the interest annually.

We can find no case interpreting subdivision (f)(3)(G) of Penal Code section 1202.4, which would prevent the trial court from compounding interest annually. However, we observe that in awarding restitution to each of the victims, particularly those that claimed loss of future economic support, the final amount included a windfall to the victims. On rehearing, the court must use a rational and factual method for calculating victim restitution that justifies compounding the interest annually.<sup>20</sup>

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<sup>20</sup> On the record presented there does not appear to be any issue of loss of use of the money for anything other than subsistence purposes.

*Disposition*

The restitution order is reversed and the case is remanded to the trial court for a new restitution hearing on the economic losses sustained by Laura, Cabrera, the parents of Escobar and the parents of Escalante. After a determination of these amounts, the court shall add to the total \$14,875.10 for the funeral expenses paid by Michael Hernandez.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.